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No. 08-1413

In the Supreme Court of the United States

DENNIS J. LAROCHE, PETITIONER

v.

ERIC K. SHINSEKI, SECRETARY OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's appeal was untimely, under 38 U.S.C. 7266 and Rule 4(a) of the Rules of Practice and Procedure for the United States Court of Appeals for Veterans Claims, because it was received by the court after the statutory deadline and was mailed in an envelope that did not bear a United States Postal Service postmark.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-2a) is not published in the *Federal Reporter* but is reprinted in 310 Fed. Appx. 389. The decision of the Court of Appeals for Veterans Claims (Pet. App. 3a-4a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 10, 2009. The petition for a writ of certiorari was filed on May 11, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner's claim for benefits was denied by the Department of Veterans Affairs. The Board of Veterans' Appeals (Board) affirmed the denial. The Court of Ap-

peals for Veterans Claims (Veterans Court) dismissed petitioner's appeal as untimely, Pet. App. 3a-4a, and the court of appeals affirmed the dismissal, *id.* at 1a-2a.

1. Decisions of the Board are reviewable in the Veterans Court. To obtain review in such cases, the appellant must file a notice of appeal with the Veterans Court "within 120 days after the date on which the notice of the decision is mailed." 38 U.S.C. 7266(a). Section 7266 further provides:

> (c) A notice of appeal shall be deemed to be received by the Court as follows:
>
> (1) On the date of receipt by the Court, if the notice is delivered.
>
> (2) On the date of the United States Postal Service postmark stamped on the cover in which the notice is posted, if the notice is properly addressed to the Court and is mailed.

38 U.S.C. 7266(c).

Rule 4(a) of the Rules of Practice and Procedure for the Veterans Court further clarifies the circumstances under which a notice of appeal will be treated as timely filed. Rule 4(a)(1) provides that a notice of appeal will be deemed to be received on "the date of its legible postmark, affixed by the United States Postal Service (not including a postage-metered date imprint other than one affixed by the United States Postal Service) on the cover in which the Notice of Appeal is posted." Vet. App. R. 4(a)(1). Rule 4(a)(2) states that the notice is deemed to be received "on the date of its receipt by the Clerk, if it does not bear a legible postmark affixed by the United States Postal Service." Vet. App. R. 4(a)(2).

2. The Board sent its notice of decision in this case on July 11, 2007. Petitioner had 120 days from that

date—until November 8, 2007—to file a notice of appeal. Vet. App. R. 4(a). Petitioner prepared a notice of appeal and, using a private electronic postage meter, weighed and date-marked the envelope. The Veterans Court received the mailing on November 13, 2007, five days after the notice of appeal was due. Pet. 5-6; see Pet. App. 3a-4a.

The Veterans Court ordered petitioner to show cause why his appeal should not be dismissed as untimely. Pet. App. 3a. Petitioner submitted an affidavit stating that his notice of appeal had been mailed using the United States Postal Service on November 7, 2007. *Id.* at 3a-4a. Petitioner attached a copy of an envelope bearing a privately-metered date stamp. *Id.* at 6a.

The Veterans Court, noting that no Postal Service postmark was affixed to the envelope, dismissed petitioner's appeal as untimely. Pet. App. 4a. The court of appeals affirmed. *Id.* at 1a-2a.

ARGUMENT

Petitioner argues (Pet. 6-7) that his notice of appeal was timely because the envelope in which it was sent was date-stamped by a private postage meter and mailed within the statutory period. The court of appeals correctly rejected that contention, and petitioner identifies no decision of any court holding that a privately-metered stamp constitutes a United States Postal Service postmark for purposes of 38 U.S.C. 7266(c) or similar filing provisions. Further review is not warranted.

1. Under Rule 4(a) of the Rules of the Veterans Court, a notice of appeal is deemed to be received "on the date of its receipt by the Clerk, if it does not bear a legible postmark affixed by the United States Postal Service." Vet. App. R. 4(a)(2). When the envelope in

which the notice of appeal is mailed *does* bear a "legible postmark, affixed by the United States Postal Service," the notice is deemed to be received on the date of that postmark. Vet. App. R. 4(a)(1). The Rule specifically states, however, that such postmarks do "not includ[e] a postage-metered date imprint other than one affixed by the United States Postal Service." *Ibid.* Because the envelope in which petitioner's notice of appeal was mailed bore a date-stamp imprinted by a private meter rather than a postmark "affixed by the United States Postal Service," the date of filing under the plain terms of the Rule was the date on which the notice was received by the Veterans Court, which came after the 120-day filing period had expired.

The court of appeals correctly concluded that petitioner had failed to satisfy Rule 4(a)(1). To gain the benefit of the postmark rule, petitioner was required to ensure that the envelope containing his notice of appeal bears a postmark affixed by the United States Postal Service and not, as here, a privately-metered date imprint. Petitioner did not satisfy that requirement. As petitioner concedes, his notice of appeal was privately weighed and date-stamped, and no mark produced by the Postal Service was affixed to the notice. Pet. 5.

2. Contrary to petitioner's suggestion (Pet. 7), Rule 4 is fully consistent with 38 U.S.C. 7266. Section 7266(c) provides that a notice of appeal is deemed to be received either on "the date of receipt by the Court" or on "the date of the United States Postal Service postmark stamped on the cover in which the notice is posted." Rule 4(a)(1) is somewhat more specific than Section 7266(c), since the Rule expressly provides that "a postage-metered date imprint other than one affixed by the United States Postal Service" will not trigger the

postmark rule. Vet. App. R. 4(a)(1). But even without that clarification, the term "United States Postal Service postmark" would not naturally be construed to encompass a metered date affixed by a private person. See *Black's Law Dictionary* 1205 (8th ed. 2004) (defining "postmark" to mean "[a]n official mark put by the post office on an item of mail to cancel the stamp and to indicate the place and date of sending or receipt"). The fact that postage meters are subject to extensive Postal Service regulation (see generally 39 C.F.R. Pt. 501) does not alter that conclusion, since the November 7 date-stamp was placed on the envelope containing petitioner's notice of appeal by a legal assistant working for petitioner's attorney, not by any Postal Service employee.[1]

As petitioner observes (Pet. 7-8), Section 7266(c)(2)'s postmark rule applies only if a "United States Postal Service postmark [is] stamped on the cover in which the notice [of appeal] is posted" *and* the notice "is mailed." Petitioner construes that language to require that mailing take place *after* the postmark has been affixed, and he contends that this sequence of events will occur only when a postage meter is used. See Pet. 7-8. Section 7266(c)(2)'s use of the word "and," however, simply makes clear that the postmark rule applies only if both of the stated prerequisites are satisfied; it does not speak to the order in which the relevant events must

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[1] Petitioner contends (Pet. 7) that "[l]egal title to all postage meters is held by the United States Postal Service." That is incorrect. The applicable Postal Service regulation provides that "[e]ach authorized provider of Postage Evidencing Systems must permanently hold title to all Postage Evidencing Systems which it manufactures or distributes except those purchased by the Postal Service or distributed outside the United States." 39 C.F.R. 501.14(a). The term "Postal Evidencing System" includes postage meters. See 39 C.F.R. 501.1(a).

occur. Under petitioner's reading, Section 7266(c)(2) would encompass notices of appeal date-stamped by private postage meters, but it would not apply to notices of appeal that are stamped and placed in the United States mails and are subsequently postmarked by Postal Service employees, since in that situation mailing occurs before the postmark is affixed. Petitioner offers no plausible reason that Congress would have excluded from Section 7266's postmark rule those notices whose postmarks furnish the strongest evidence of the dates of mailing.

In *Mapu* v. *Nicholson*, 397 F.3d 1375 (Fed. Cir. 2005), cert. denied, 547 U.S. 1018 (2006), the court concluded that Section 7266 reflects Congress's clear intent to require a valid Postal Service postmark in order for an appellant to invoke the postmark rule. In *Mapu*, a claimant argued that a notice of appeal sent by Federal Express should be eligible for the rule. The Federal Circuit noted that "Congress wanted the postmark rule to apply only to a notice of appeal that was mailed using the Postal Service." *Id.* at 1381. The court further observed that Congress's "intention to limit the waiver of sovereign immunity to the strict confines of the postmark rule is further manifested in the provisions of sections 7266(c) and (d), which clearly state that a Postal Service postmark is necessary for the postmark rule to apply." *Ibid.*

The Internal Revenue Code states that a document is deemed to have been filed on the date of the "United States postmark" found on its envelope. 26 U.S.C. 7502(a)(1). Applying that provision, the United States Claims Court concluded that a mailing bearing a private postage-meter stamp "contains no United States Postal Service postmark," and that a private mark "is

inapplicable to establish a deemed timely filing." *Raymark Indus., Inc.* v. *United States*, 15 Cl. Ct. 334, 339 (1988). Petitioner identifies no decision holding that a date-stamp imprinted by a private meter constitutes a "United States Postal Service postmark."

3. Petitioner contends (Pet. 8) that Rule 4 lacks a rational basis. That argument was not raised below and therefore is not properly before this Court. See, *e.g.*, *Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 56 n.4 (2002). As a result of petitioner's failure to raise that issue below, the record in this case contains no evidence bearing on petitioner's contention (see Pet. 8) that backdating of private postage meters is technologically impossible. Current Postal Service regulations do not reflect the premise that privately-held postage meters are technologically infallible. See, *e.g.*, 39 C.F.R. 501.11 ("Reporting Postage Evidencing System security weaknesses"). And even if petitioner's assertion is assumed to be true, a party could still print a postmark for a notice of appeal within the appeal period and then place the notice of appeal in the mail after the appeal period had expired.

Because the Postal Service cannot be expected to detect such subterfuge in every instance, limiting the postmark rule to postmarks affixed by the Postal Service serves a legitimate purpose even assuming that backdating of postage meters is now impossible. Petitioner's reliance upon *Rosenthal* v. *Walker*, 111 U.S. 185, 189 (1884), is therefore misplaced.[2] The governing stat-

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[2] The Court in *Rosenthal* applied the common-law mailbox rule, which provides that "if a letter properly directed is proved to have been either put into the post-office or delivered to the postman, it is presumed, from the known course of business in the post-office department, that it reached its destination at the regular time, and was re-

utes and regulations do not place a duty upon the Postal Service to detect and re-date every piece of privately-metered mail that is deposited on a date other than the one stamped. Thus, neither Rule 4 nor Section 7266 presumes that the Postal Service will fail to do its duty in the ordinary course of business.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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ceived by the person to whom it was addressed." 111 U.S. at 193. In this case, however, there is no dispute about whether or when petitioner's notice of appeal was received by the Veterans Court. The issue instead is whether the date-stamp affixed by the postage meter held by petitioner's attorney was a "United States Postal Service postmark" within the meaning of Section 7266(c)(2). The decision in *Rosenthal* does not speak to that question.